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No. 86-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN P. MADDEN, CHARLES J. OSWALD, and RICHARD W. KURRE, Individually and as Representatives of a Class of Persons,
Petitioners,

vs.

JEFFREY M. GLUCK, DEBRA McALEAR GLUCK and LANDMARK ST. LOUIS BANK, N.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF JEFFREY M. GLUCK AND DEBRA McALEAR GLUCK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 815 F.2d 1163 and is reprinted in the Petition Appendix. The District Court's Order and Memorandum is also included in Petitioners' Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1987, and the petition for rehearing en banc and the petition for rehearing by the panel were denied on March 9,

1987. These Respondents acknowledge that this Court has jurisdiction to hear the Writ.

STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§1961-1968, as amended (RICO).

The relevant sections of these statutes are set forth in the Petition.

REASONS THAT THE WRIT SHOULD NOT BE GRANTED

A. This Court Should Not Grant Certiorari For Any Existing Conflict Presented By The Petition Is Resolved By Legislation Currently Pending In Congress.

Petitioners assert that this case presents a conflict with the decisions rendered by other federal circuit courts concerning the requirements necessary to constitute a pattern of racketeering activity pursuant to 18 U.S.C. 1961(1). Petitioners also assert that the decision below contradicts this Court's decision interpreting the pattern requirement in *Sedima S.P.R.L. v. Imrex*, ____ U.S. ____, 105 S.Ct. 3275 (1985). Petitioners claim that the decision below wrongfully requires the existence of two schemes to satisfy the pattern requirement. This Court should not issue certiorari because the alleged conflict asserted by Petitioners is resolved by legislation currently pending in Congress.

On October 7, 1986, the House of Representatives passed Bill No. 5445. *See, RICO Business Dispute Guide,* (CCH) ¶ 6041.50 (Feb. 1987). The Bill passed by an overwhelming majority of 371 votes in favor and 28 votes in opposition. *United States House of Representatives Legislative Calendar, Committee on the Judiciary,* 99th Cong., 1st Sess. and 2d Sess. 205 (1986). The terms of the Bill legislatively define the pattern requirement for purposes of RICO. The Bill replaces the term "racketeering activity" with the term "illicit activity" and will amend 18 U.S.C. 1964(c) to require:

> "For a civil action. . . the term 'pattern of illicit activity' requires at least two acts of illicit activity—
>
> "(a) one of which occurred not more than five years after the prior act of illicit activity;
>
> "(b) that are not so closely related in time and place that together the acts constitute a single episode . . ." (*RICO Guide, supra.*)

This Bill is currently pending before the Senate Committee on the Judiciary. *See, Legislative Calendar, supra.* The overriding

focus of Bill 5445 is to sharply limit the abuses of civil RICO. Most suits now being filed are, in essence, state actions which litigants have chosen to federalize as RICO suits. The adoption of the "multiple episodes" requirement in Bill 5445 will curb many of the abuses.

More importantly, the requirement of "multiple episodes" will legislatively abrogate the exact issue Petitioners wish this Court to decide in the instant case. This Court has placed a duty upon parties opposing certiorari to identify corrective legislation and its implications. In *Rice v. Sioux City Memorial Cemetary,* 349 U.S. 70 (1955), this Court noted the importance of the enactment of corrective legislation in determining whether certiorari should issue. In *Rice,* the lower courts denied Petitioner's constitutional claim and this Court subsequently granted certiorari. Following the grant of certiorari, the Court discovered that the State had enacted legislation that barred "the ultimate questions presented in this case from again arising ...." *Id.* at 73. As a result of the corrective legislation, this Court held that the case no longer presented "special and important" reasons for granting the writ of certiorari and dismissed the writ as improvidently granted. *Id.* at 77.

Justice Frankfurter, in delivering the opinion of the Court, noted that where corrective legislation is enacted, the Court should not adjudicate the case because the issues are no longer of importance to the public, but merely to the parties. *Id.* at 77, 79. *See also, Cook v. Hudson,* 429 U.S. 165 (1976) (writ of certiorari dismissed as improvidently granted where corrective legislation enacted after decision below); *Morris v. Weinberger,* 410 U.S. 422 (1973) (writ of certiorari dismissed as improvidently granted where Congress amended relevant statutory provisions twenty days after this Court granted certiorari); *District of Columbia v. Sweeney,* 310 U.S. 631 (1940) (certiorari denied because question is not of public importance where Congress repeals statute).

Another concern inherently arises in cases where this Court is asked to adjudicate an issue which is currently being corrected

by the Legislature. In these cases, the Court will expend its limited and valuable judicial resources to resolve an issue which the Legislature has, in essence, already resolved. The Court "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice,* 349 U.S. at 77.

The instant case is not an appropriate case for adjudication by this Court. In light of the current posture of the legislative proposal that expressly defines "pattern of conduct" for purposes of RICO, any action by this Court will soon be abrogated or outmoded and this Court should not grant Certiorari.

B. The Decision Below Does Not Raise Questions Of Exceptional Importance Which Should Be Settled By This Court.

Petitioners assert that the decision below conflicts with decisions rendered by other federal circuit courts on the interpretation of the pattern requirement of RICO. Petitioners have noted the different ways various circuits have postulated the "continuity plus relationship" requirement pursuant to this Court's decision in *Sedima S.P.R.L. v. Imrex,* ____ U.S. ____, 105 S.Ct. 3275 (1985). A review of the instant case reveals that in applying the RICO statute to the facts, the lower court's finding that the alleged acts lacked sufficient continuity to form a pattern is proper under any of the various circuits' rendition of the pattern requirement.

Although Petitioners identify five federal circuit court opinions which they argue are diametrically opposed to the decision below,[1] Petitioners fail to note that the incongruity is not in the

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[1] Petitioners cite the Fifth Circuit opinion in *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350 (5th Cir. 1985). As Petitioners note in their brief, the court in *R.A.G.S.* did not articulate a specific definition of pattern, and thus the decision is not helpful to their case. Moreover, the viability of the *R.A.G.S.* decision was called into question in *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 785 F.2d 1274 (5th Cir. 1986).

test the circuits apply, but in the circuit's articulation of the pattern requirement. Pursuant to this Court's famous footnote fourteen in *Sedima,* the circuit courts have all focused on the exact same test, whether the alleged acts of racketeering exemplify "continuity plus relationship" sufficient to show a pattern. This Court in *Sedima* directed lower courts, in deciding whether this test is met, to focus on numerous factors including whether the activity "embraces criminal acts that have the same or similar purpose, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Sedima,* 105 S.Ct. at 3285, n. 14.

Based on this directive, lower Courts have applied these various factors to divergent facts and it is only in articulating their reasoning that any alleged confict arises. The First Circuit recently stated its reasoning as, "[c]onstituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence." *Roeder v. Alpha Industries, Inc.,* 814 F.2d 22, 30 (1st Cir. 1987). The Second and Eleventh Circuits have articulated their evaluation of the numerous factors as requiring more than one racketeering act and the threat of continuity activity. *Bank of America National Trust and Savings Association v. Touche Ross & Co.,* 782 F.2d 966 (11th Cir. 1986); *United States v. Ianniello,* 808 F.2d 184, 191 (2nd Cir. 1986) ("continuing operation"). The Seventh Circuit has stated that the predicate acts must be ongoing over an identified period of time so that they can therefore be viewed as constituting "separate transactions". *Morgan v. Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986).

In comparison, the Eighth Circuit has found no evidence of continuity unless there is proof that the defendant has engaged in illicit activities in the past or that they are engaged in other criminal activities elsewhere. *Superior Oil Company v. Fulmer,* 785 F.2d 252, 257 (8th Cir. 1985). Where evidence exists of only one fraudulent episode or scheme, no continuity exists. *Id.*

A review of the various renditions by the circuits reveals that all the courts are indeed focusing on the same test, "continuity plus relationship". Simply because the Eighth Circuit labels its continuity inquiry as a scheme, does not create a conflict. The semantic differences in the terms, episode, transaction, scheme, occurrence, or operation, does not create a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" to warrant a grant of certiorari. *Layne and Bowler Corp. v. Western Wellworks, Inc.*, 261 U.S. 387, 393 (1923). This Court has previously refused to grant certiorari on this same alleged conflict in the Eighth Circuit in the case of *Holmberg v. Morrisette,* 800 F.2d 205, *cert. denied,* 55 L.W. 3730 (Summary disposition, April 27, 1987). The issues presented in the instant petition are no different than the issues presented to this Court in *Holmberg*.

No matter how the inquiry is framed, the circuit courts are focusing on the same test, continuity plus relationship. The Eighth Circuit in the case below concluded that the facts alleged by Petitioners "lack sufficient continuity to form a 'pattern of racketeering activity'." (Petition, App. A-3.) Whether this determination is characterized by the First Circuit's language of "isolated occurrence", the Second Circuit's "continuing operation", or the Seventh Circuit's ongoing and "separate transactions" language, the result is the same. Petitioners did not meet the continuity requirements set forth by this Court in *Sedima*. The Petitioners did not allege any facts indicating that Respondents had engaged in like activities in the past or that they were engaged in any other criminal activity.

Under any of the circuit's characterizations, the activities of respondents in the instant case do not meet this Court's continuity plus relationship requirement necessary to state a pattern of conduct under RICO. The court below's decision in applying the RICO statute to the facts of this case is proper and this Court should not grant certiorari.

CONCLUSION

The instant petition does not raise any questions which should be settled by this Court. The court below correctly applied the RICO statute to the facts before it. In addition, any decision by this Court interpreting the pattern requirement of RICO is premature at this time, in light of the pending legislation resolving that issue.

Respectfully submitted,

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